REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

(Coram: Kneller, J A, Chesoni and Platt, Ag. J.A)

CRIMINAL APPEAL 72 OF 1983

BETWEEN

AYUB CHETAMBE MUSAMBAI ……APPELLANT

AND

REPUBLIC……..RESPONDENT

(Appeal from a conviction and judgment of the High Court of Kenya at Kakamega (appeal from a conviction and judgment of the High Court of Kenya at Kakamega (Gichuri, J)

dated May 12, 1983 in

Criminal Appeal 203 of 1982)

JUDGMENT OF THE COURT

Ayub Chetambe Musambai, the Appellant, was convicted by the Kakamega senior resident magistrate of stealing contrary to section 275 of the Penal Code and sentenced to two years imprisonment on December 4,1982. His appeal against conviction and sentence to the High Court (Gichuru, Ag J) at Kakamega was dismissed on June 15,1983.

Mr Anassi for the appellant asks this court to reverse the judge and so quash the conviction and set aside the sentence. We can only deal with matters of law so far as the conviction is concerned and we cannot interfere with the severity of the sentence, if the conviction is sound, because it was a legal one. Section 361(1) Criminal Procedure Code.

He was charged on December 15,1981 with stealing Kshs. 30,000 in cash from a business associate, Wanjala Munialo on December 10, 1981 in Bunyenye village, Nzoia Location, Kakamega District, Western Province.

The Republic called six witnesses and then the appellant testified and his brother gave evidence on his behalf. The trial magistrate who saw and heard them all believed the witnesses of both sides told the truth and the appellant did not do so. The judge did not specifically deal with their credibility but as he held the appellant's conviction was appropriate, he must have been satisfied that the magistrate was correct in his assessment.

There was no direct evidence that the appellant stole this money. The Republic advanced only circumstantial evidence and the other two courts were satisfied that it proved beyond any reasonable

doubt that the appellant was guilty of this offence. Were the facts which the Repubic proved sufficient to justify the drawing the inference that the Appellant stole this cash? Were the inculpatory facts incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of his guilty? R v. Kipkering arap Koske and another (1949) 16 EACA 135. Did the circumstantial evidence point irresistibly only to the Appellant? R V. George Wi lliam Senkatuka (1946), 13 EACA 89; R. v. Theracithi (1946), 13 EACA 119. Suspicion of varying degrees of intensity is not enough. R. v. lsraili Epulu Achietu (1934), 1 EACA166.

The magistrate found that the inculpatory facts pointed irresistibly to the guilt of the appellant and amounted to much more than suspicion. Wanjala Munialao handed the appellant this cash on December 10, 1981 to look after it from about 6 pm until the next morning and the appellant did not return it because he said that during the night some burglars had stolen it. He took Wanjala Munialo and some of the other witnesses for the Republic to the house of his second wife, which was one of three in his homestead and grass thatched. He showed them its three doors and windows and inside the bedroom a cupboard in which he said he had locked away this money He also showed them some unlocked steel boxes outside the house and some of his clothes strewn about the place. They examined the doors, windows cupboard and boxes and their locks and fastenings. He also showed them another house belonging to a different wife in which he went to sleep at 10 pm.

At the trial the Appellant swore that he locked the cupboard with a key which he put in his pocket that house, he continued and gave the house keys to his children. Then he locked that house he continued and gave the house keys to his children. The time was then about 7 pm and he went off with Wanjala Munialo and some others to Moi's Bridge for some supper and some beer. Back they went to his place at Bunyenye at about 10 pm. He invited Wanjala Munialo to spend the night there but he refused and went off to Vinyenyi to rejoin his employees. Wanjala Munialo swore that he was not invited to spend the night in one of the Appellant's cottages.

The Appellant found the house of his second wife still locked and seemingly secure at 10 pm and he went to sleep in the house of another wife. The second wife was away at the time so the cash was in her house and there was no-one else in it. At about 6.30 am the next morning some of his children told him that one of the three doors to the house of his second wife was open, and when he went to it he found it was the rear door. Someone had broken the lock of that door and the lock of the cupboard where the cash had been stowed for the night. His papers were scattered around inside this house. Three of his steel boxes had been broken into and some of his clothes were scattered around them. Other things that were missing were his bicycle, forty records, a cassette player, two school uniforms and four receipts for school fees. He did not sleep in the house where the money was, he explained, because, among other things, he never thought it would be burgled.

He told Wanjala Munialo at Vinyenyi what had happened and then he went to Matunda Police Patrol Base and told Constable Mulambi who took him to Inspector Rabuogi at Turbo Police Station. Then they all trooped off to his three houses and looked at the doors, windows and the cupboard in the house of the second wife and the house in which he slept. They all said that the doors, windows, cupboard and boxes had no signs about them of having been tampered with save for Simeon Lusweti Waminilia who found the wood round the lock of one door of the house of the second wife had been splintered.

The complainant saw the key in the lock of the cupboard in which the cash had been put, and the appellant told them that the thieves had used the key to unlock it.

Wanjala Munialo saw one steel box outside and Inspector Rabuogi saw two. Wanajala Munialo saw no clothes scattered about and Inspector Rabuogi saw them outside the house of another wife and not that of the second. Constable Mulambi received from a citizen a bicycle on December 12 and from a local elder a cassette player on some unspecified date which he said they reported they had discovered somewhere in the bush. The appellant claimed them as his and stolen together with the cash. Constable Mulambi knew nothing of any gramophone records being brought in to him, but Inspector Rabuogi found them at Matunda on December 11 and he said someone brought these there but he did not say who did so and when this happened. They were all marked with the initials of the appellant.

The magistrate found on all this that the appellant did not ask Wanjala Munialo to sleep in any of his houses. The appellant chose to sleep in a different house and left the cash unguarded. He said both houses were broken into and this was untrue. The police did not find the bicycle, cassette player or records. No burglar would have left the clothes of the appellant outside the house. The appellant reported the matter to Wanjala Munialo and then to the police. No one else had seen these burglars and the burglaries were creations of the appellant's imagination. He had the key to the cupboard at the time but he said the burglars used that key and the next morning there it was, still in the lock in the cupboard.

The learned judge found another inculpatory fact. The appellant did not collect this sum from that cupboard at 10 pm and take it with him to the other house in which he decided to sleep.

So both the trial magistrate and the judge found that what the appellant did was to steal the cash and try to cover up with these signs of a burglary. The Appellant's advocate submits that the circumstantial evidence was not enough to justify the magistrate and the judge drawing the inference that the Appellant stole this money. At least four people knew that it was in the house of the second wife. There seemed to be no evidence of their whereabouts when it was stolen. One witness said that it was possible for the culprit to remove part of the thatch of the house and then drop down into it and return the same way without breaking a door or window or lock. There was no fingerprint evidence about the door or window or locks. The appellant had told the complainant and the police as soon as possible. Other goods stolen at the same time were brought into the police. The appellant was not the only one with the opportunity to steal it.

The crucial inculpatory fact of which the appellant had no explanation was that the key in the lock to the cupboard ought to have been in the Appellant's own possession. It was the Appellant's own case that he had locked the cupboard and kept the key in his pocket. There was no explanation that anyone else could have had a key to the cupboard. Therefore the only inference can be that it was the appellant who controlled the cupboard and the money locked inside. Looked at in this way neither the complainant nor his employees nor anyone else could have interfered with the money without the appellant's knowledge. The appellant did not say that when he got up in the morning he did not have the key to the cupboard and therefore there was evidence upon which the courts below could infer that the appellant remained in control of the money throughout to the exclusion of everyone else. Upon that basis the rest of the evidence takes the www.kenyalawreports.or.ke form of a mock burglary. The way in which the boxes and clothing were found outside the house, and the way in which articles alleged to have been lost reappeared so easily and the manner in which the door of the house and the cupboard had been interfered with, without any physical signs of breaking, all provided the lower courts with evidence upon which they could conclude that the breaking was a sham. On the evidence accepted by them we think that the irresistible inference was rightly drawn that the circumstantial evidence pointed only to the guilt of the Appellant.

Consequently we find that there are no grounds upon which the appeal can be allowed and it is dismissed.

Delivered at Kisumu this 9th day of December 1983.

A.A. KNELLER

Judge of Appeal

Z.R. CHESONI

Ag. Judge of Appeal

H.G. PLATT

Ag. Judge of Appea l